TAKONG TABARI

v.

GOVERNMENT OF SARAWAK & ORS & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: Q-01-181-95 & Q-01-182-95]
5 AUGUST 1998

CIVIL LAW ACT: *Damages - Fatal accident - Multiplier - Whether common law deductions still applicable - Civil Law Act 1956, s. 7*

DAMAGES: *Fatal accident - Dependency claim - Multiplier - Whether common law deductions still applicable - Civil Law Act 1956, s. 7*

CIVIL PROCEDURE: *Appeal - Apportionment of liability - When appellate court will interfere - Whether there had been misdirection by judge*

TORT: *Negligence - Dangerous premises - Gas explosion causing death to visitor - Whether tenant liable - Duty of tenant as occupier - Whether gas authority liable - Duty of gas authority in installing gas pipes and supplying gas - Apportionment of liability*

CIVIL PROCEDURE: *Costs - Direct payment of costs by unsuccessful defendant to successful defendant - Sanderson order - Plaintiff ordered to pay successful defendant's costs - Whether unsuccessful defendants should pay successful defendant's costs - Discretion of judge - What circumstances warrant Sanderson order - Rules of the High Court 1980, O. 59 r. 3(2)*

The appellant's husband, Jeffrey Satuk Gabar ('the deceased'), was killed in a gas explosion at the premises of Public Bank Bhd ('the bank') in Miri on February 1990. The explosion also seriously injured one Chin Fuei Yung ('Chin') who suffered second and third degree burns. The appellant brought a suit against the Government of Sarawak ('the Government') as supplier of the gas, Liew Yit Tze ('Liew') and Phua Su Meng ('Phua') as registered proprietors of the premises, and the bank as tenant, seeking damages on her own behalf and on behalf of the deceased's dependent children and aged parents under ss. 7 and 8 of the Civil Law Act 1956 ('the CLA') ('the first suit'). The principal causes of action were based on the rule in *Rylands v. Fletcher,* negligence and nuisance. Chin filed separate proceedings for damages based on similar grounds ('the second suit').

Some of the defendants filed third party proceedings claiming contribution and indemnity from each other, the director of the Public Works Department ('the director') and the building consultant which had renovated the premises prior to the bank's occupation ('the consultant'). Judgment was entered against Phua in the first suit whilst the writ in the second suit was not served on him.

At the joint trial in the High Court, evidence was led that about a month prior to the explosion, staff of the bank had noticed a foul odour in the bank, but had not made more than mere cursory enquiries as to its cause. It was also not disputed that the Government had connected the gas supply to the bank as a matter of course, without being requested to do so by either Liew or Phua, and without notifying the bank.

The trial judge held, in finding for the appellant in the first suit, that: (i) the Government was vicariously liable for its agent, the director, for failing to take appropriate steps to ensure safety after connection of the gas to the premises; (ii) the bank was negligent in failing to investigate the foul smell which preceded the explosion; and (iii) alternatively, the bank was liable for breach of duty as occupier to ensure that its premises were safe. The appellant abandoned her claims based on *Rylands v. Fletcher* and nuisance. Liew was absolved from blame and judgment was entered in his favour against the appellant. Liability between the bank and the Government was apportioned at 10% on the bank and 90% on the Government.

In respect of the second suit, in entering judgment in Chin's favour, the judge held: (i) there was no evidence to show that the consultant's renovation works were defective and therefore the bank's claim against it for indemnity or contribution failed; (ii) the bank succeeded in its claim for contribution or indemnity from the director and the Government; and (iii) Chin's claim under *Rylands v. Fletcher* and nuisance failed for lack of evidence. No blame was attached to Liew and liability was apportioned at 90% on the part of the Government and 10% on the bank.

The judge awarded the appellant, *inter alia*, RM270,000 for loss of dependency but deducted one-third of this amount for contingencies, vicissitudes of life and accelerated payment, leaving RM180,000 as general damages. The damages were to be divided between the dependents in the proportion of 20% to the appellant as widow, 15% each to the two elder children, 20% each to the two younger children and 5% each to the parents. The appellant was ordered to pay Liew's costs.

Chin was awarded, *inter alia*, RM50,000 as general damages, RM20,000 for loss of earnings and $124,152.10 for medical expenses. He was also ordered to pay Liew's costs.

The appellant appealed against the judge's award, in respect of: (i) the one-third deduction on general damages, on the ground that the statutory formula provided in s. 7(3)(iv)(d) of the CLA, which replaced the common law position, already took into account contingencies, vicissitudes of life and accelerated payment, relying on the minority decision of the Supreme Court in *Chan Chin Min & Anor v. Lim Yoke Eng* [1994] 3 CLJ 687; and (ii) the order to pay Liew's costs, arguing that the judge should have made a *Bullock or Sanderson* order against the bank and the Government.

The Government appealed against the entire judgment, but at the appeal, confined itself to the judge's apportionment of liability, arguing that the bank as occupier had complete control of the premises and should have been more vigilant in its efforts to trace the source of the foul smell. The Government argued that for its omission to act, the bank should bear 80% of the liability.

Held:
Per Siti Norma Yaakob JCA

[1] The majority judgment in *Chan Chin Min* held that proviso (d) to s. 7(3)(iv) of the CLA did not provide with irresistible clarity an intention to depart from the common law practice of making deductions for contingencies, vicissitudes of life and accelerated payment. Therefore, the practice remains in force. The instant court was bound by the principle of *stare decisis* to follow the majority decision.

[2] What constitutes a proper case for a costs order depends on the facts of each case. As the trial judge had not stated why he ordered the appellant to pay Liew's costs, the court could only assume he did so on the general principle that costs should follow the event.

[3] Under O. 59 r. 3(2) of the Rules of the High Court 1980, the judge had the jurisdiction to make a *Bullock or Sanderson* order. On the facts, it was reasonable for the appellant to have joined the defendants as it was not possible to ascertain who was responsible for the explosion. The surrounding circumstances of the appellant's claims called for the exercise of the discretion to make a *Sanderson* order. The order of the judge was therefore varied such that Liew's costs were to be paid directly by the Government and the bank in proportion to their respective liabilities.

[4] As the appellant succeeded partly in her appeal, she was awarded half the costs of her appeal to be paid by the Government and the bank in proportion to their respective liabilities.

[5] An appellate court will interfere with the decision of a trial judge in apportioning liability if the trial judge had erred in principle or misapprehended the facts. However, even if neither is shown, an appellate court will interfere if it is of the opinion that the judge was clearly wrong.

[6] The trial judge had found that although the bank could not be held responsible for bringing or allowing the supply of gas into the premises, it had failed to take adequate steps to investigate the cause of the unfamiliar smell in the premises. This omission led, to a certain degree, to the happening of the event.

[7] However, against this finding, it was undisputed that it was the policy of the Government, through its agent, the director, to install and supply gas to all premises in Miri without being requested to do so. Neither Phua nor the bank had made such a request. In fact, Liew had applied to have the gas supply disconnected in 1986. There was also evidence that the director installed gas meters to the premises without notifying Liew or Phua, and did not carry out any leak-detection tests subsequently.

[8] The omission of the bank was therefore understandable as it was not aware of the existence of the gas supply to the premises and the smell of the gas was not distinctive enough to enable a positive identification of it as such. However, the bank was not totally absolved of blame.

[9] On the face of the record, there had been no misdirection or error on the part of the judge in holding that the Government should bear a heavier responsibility. The bank, by having mere control of the premises without more, could not be made to bear greater responsibility than the Government, which had installed the gas supply but had done nothing more to ensure the safety of the users of the premises. The apportionment of liability was confirmed as having being rightly made in law.

[Appellant's appeal allowed in part; Government's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Jeffrey Satuk Gabar ('simati tersebut') yang merupakan suami perayu, telah terbunuh dalam satu letupan gas di premis Public Bank Bhd ('bank tersebut') di Miri pada bulan Februari 1990. Letupan itu telah juga mencederakan seorang bernama Chin Fuei Yung ('Chin') dengan teruknya, beliau mengalami luka terbakar darjah kedua dan ketiga. Perayu telah memulakan satu guaman terhadap Kerajaan Sarawak ('Kerajaan tersebut') sebagai pembekal gas tersebut, Liew Yit Tze ('Liew') dan Phua Su Meng ('Phua') sebagai tuanpunya berdaftar premis tersebut, dan bank tersebut sebagai penyewa. Beliau berusaha untuk mendapatkan gantirugi bagi pihak dirinya sendiri dan bagi pihak anak-anak

tanggungan simati serta ibubapa yang telah lanjut usia di bawah ss. 7 dan 8 Akta Undang-Undang Sivil 1956 ('CLA tersebut') ('guaman pertama'). Kausa-kausa tindakan utama adalah berasaskan kaedah dalam *Rylands v. Fletcher* kecuaian dan kacau-ganggu. Chin telah memfailkan prosiding yang berasingan untuk mendapatkan gantirugi berdasarkan alasan-alasan yang sama ('guaman kedua tersebut').

Sebilangan defendan-defendan telah memfailkan prosiding pihak ketiga yang menuntut sumbangan dan tanggungan rugi daripada satu dan yang lain, Pengarah, Jabatan Kerja Raya ('Pengarah tersebut') dan perunding bangunan yang telah mengubahsuai premis tersebut sebelum penghunian oleh bank ('perunding tersebut'). Penghakiman telah dimasukkan terhadap Phua dalam guaman yang pertama sedangkan writ dalam guaman kedua telah tidak disampaikan ke atas beliau.

Dalam perbicaraan bersesama di Mahkamah Tinggi, keterangan telah diberikan bahawa lebih kurang satu bulan sebelum letupan tersebut, kakitangan bank telah mendapati bau yang busuk dalam bank tersebut, tetapi telah tidak membuat siasatan yang lebih daripada hanya sekadar sepintas lalu sahaja berhubung dengan keadaan yang menyebabkan bau yang busuk itu. Adalah juga tidak dipertikaikan bahawa Kerajaan tersebut telah menyambungkan bekalan gas kepada bank tersebut sebagai suatu hal biasa sahaja, tanpa diminta berbuat sedemikian oleh samada Liew atau Phua, dan tanpa memberitahu bank tersebut.

Hakim perbicaraan memutuskan bagi pihak perayu dalam guaman pertama bahawa: (i) Kerajaan adalah secara tidak langsung bertanggungan bagi ejennya, Pengarah tersebut, kerana gagal mengambil langkah-langkah bagi memastikan keselematan selepas penyambungan gas kepada premis tersebut; (ii) bank cuai kerana gagal menyiasat bau busuk yang telah berlaku sebelum letupan tersebut; dan (iii) secara alternatifnya, bank bertanggungan bagi kemungkinan akan tugas-tugasnya sebagai penghuni bagi memastikan premisnya selamat. Perayu telah menghentikan tuntutan-tuntutannya berdasarkan *Rylands v. Fletcher* dan kacau ganggu. Liew dibebaskan daripada dipersalahkan dan penghakiman telah dimasukkan memihak kepadnya terhadap perayu. Tanggungan antara bank dan Kerajaan tersebut telah diagihkan pada kadar 10% ke atas bank dan 90% ke atas Kerajaan.

Berhubung guaman kedua, dalam mencapai penghakiman yang memihak kepada Chin, hakim telah memutuskan: (i) tidak terdapat keterangan bagi menunjukkan bahawa kerja-kerja pengubahsuaian perunding tersebut tidak sempurna dan dengan itu tuntutan bank terhadapnya bagi mendapatkan tanggungan rugi atau sumbangan telah gagal; (ii) bank telah berjaya dalam tuntutannya untuk mendapatkan sumbangan atau tanggungan rugi daripada

Pengarah dan Kerajaan tersebut; dan (iii) tuntutan Chin di bawah *Ryland v. Fletcher* dan kacau ganggu gagal kerana ketiadaan keterangan. Liew tidak dipersalahkan dan tanggungan telah diagih-agihkan pada kadar 90% di pihak Kerajaan dan 10% ke atas bank.

Hakim telah mengawardkan kepada perayu, antara lainnya, RM270,000 bagi kehilangan wilayah tanggungan tetapi telah menolak satu per tiga dari jumlah ini untuk kontingensi, jatuh-bangun dalam kehidupan dan mempercepatkan pembayaran, yang meninggalkan jumlah sebanyak RM180,000 sebagai gantirugi am. Gantirugi tersebut hendaklah dibahagi-bahagikan antara tanggungan-tanggungan dalam agihan sebanyak 20% kepada perayu sebagai balu, 15% setiap satu bagi kedua-dua anak yang lebih tua, 20% setiap satu kepada dua anak yang lebih muda dan 5% setiap satu bagi ibubapa. Perayu telah diperintahkan supaya membayar kos Liew.

Chin telah diawardkan, antara lainnya, RM50,000 sebagai gantirugi am, RM20,000 kerana kehilangan mata pencarian dan RM124,152.10 bagi perbelanjaan perubatan. Beliau telah juga diperintahkan untuk membayar kos Liew.

Perayu telah merayu terhadap award hakim tersebut, berhubung dengan: (i) potongan satu per tiga gantirugi am, atas alasan bahawa formula berkanun yang diberikan dalam s. 7(3)(iv)(d) CLA tersebut, yang telah menggantikan kedudukan common law, telah pun mengambilkira kontinjensi, jatuh-bangun kehidupan dan pembayaran yang dipercepatkan, bergantung pada keputusan minoriti Mahkamah Agong dalam *Chan Chin Min & Anor v. Lim Yoke Eng* [1994] 3 CLJ 687; (ii) terhadap perintah untuk membayar kos Liew, dengan berhujah bahawa hakim seharusnya telah membuat perintah *Bullock* atau *Sanderson* terhadap bank dan Kerajaan tersebut.

Kerajaan tersebut telah merayu terhadap keseluruhan penghakiman, tetapi di perbicaraan tersebut, telah menetapkan dirinya kepada pengagihan tanggungan oleh hakim, dengan berhujah bahawa bank tersebut sebagai penghuni mempunyai kawalan sepenuhnya akan premis tersebut dan seharusnya lebih berjaga-jaga dalam usaha-usahanya untuk mengesan punca bau yang busuk itu. Kerajaan tersebut berhujah bahawa atas peninggalannya untuk bertindak, bank seharusnya menanggung sebanyak 80% daripada tanggungan tersebut.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Penghakiman majoriti dalam *Chan Chin Min* telah memutuskan bahawa peruntukan (d) kepada s. 7(3)(iv) CLA tersebut tidak memperuntukan dengan jelasnya yang tidak dapat ditahan suatu niat untuk menyimpang daripada amalan common law bagi membuat potongan untuk kontinjensi, jatuh bangun kehidupan dan pembayaran yang dipercepatkan. Dengan itu, amalan tersebut kekal berkuakuasa. Oleh kerana ianya lebih rendah daripada Mahkamah Agong, mahkamah semasa adalah terikat pada prinsip *stare decisis* untuk mengikuti keputusan majoriti.

[2] Apa yang membentuk satu kes yang wajar bagi perintah kos bergantung pada fakta-fakta setiap satu kes. Oleh kerana hakim telah tidak menyatakan mengapa beliau telah memerintah perayu supaya membayar kos Liew, mahkamah menganggapkan beliau berbuat sedemikian atas prinsip am bahawa kos seharusnya menyusuli peristiwa tersebut.

[3] Di bawah A. 59 k. 3(2) Kaedah-kaedah Mahkamah Tinggi 1980, hakim mempunyai bidangkuasa untuk membuat satu perintah *Bullock* atau *Sanderson.* Berdasarkan fakta-fakta, ianya adalah wajar bagi perayu untuk menggabongkan defendan-defendan tersebut kerana ianya tidak berkemungkinan menentukan siapa yang bertanggungjawab bagi letupan tersebut. Keadaan-keadaan yang mengelilingi tuntutan perayu menuntut pelaksanaan budibicara bagi membuat satu perintah *Sanderson.* Perintah hakim tersebut adalah dengan itu diubah sehinggakan kos Liew hendaklah dibayar secara langsung oleh Kerajaan dan bank tersebut menurut agihan tanggungan mereka masing-masingnya.

[4] Oleh kerana perayu telah berjaya sebahagiannya dalam rayuannya, beliau telah diawardkan setengah daripada kos rayuannya supaya di bayar oleh Kerajaan dan bank tersebut menurut agihan tanggungan mereka masing-masingnya.

[5] Sesebuah mahkamah rayuan akan mencampuri dengan keputusan hakim perbicaraan dalam mengagihkan tanggungan jika hakim perbicaraan tersebut telah tersalah pertimbangan menurut prinsip atau telah tersalah faham fakta-fakta. Walaubagaimanapun, jika tidak satu pun ditunjukkan, sesebuah mahkamah rayuan akan mencampuri jika ianya berpendapat bahawa hakim tersebut jelas salah dalam pertimbangannya.

[6] Hakim perbicaraan telah mendapati bahawa walaupun bank tersebut tidak boleh dipertanggungjawabkan kerana membawa atau membenarkan pembekalan gas ke dalam premis tersebut, namun ianya telah gagal untuk mengambil langkah-langkah yang memadai untuk menyiasat punca bau yang tidak menyenangkan dalam premis tersebut.

[7] Ianya adalah tidak dipertikaikan bahawa adalah menjadi dasar Kerajaan, melalui ejennya, Pengarah tersebut, untuk memasang dan membekalkan gas kepada kesemua premis di Miri tanpa diminta berbuat sedemikian. Phua mahupun bank tersebut telah tidak membuat permintaan yang sedemikian. Malahan, Liew telah memohon supaya bekalan gas tersebut dibatalkan dalam tahun 1986. Terdapat juga keterangan bahawa pengarah tersebut telah memasangkan meter-meter gas kepada premis tersebut tanpa memberitahu Liew atau Phua, dan telah tidak menjalankan sebagai ujian-ujian pengesahan kebocoran kemudiannya.

[8] Perkara yang ditinggalkan oleh bank tersebut adalah dengan itu dapat difahamkan kerana ianya tidak mengetahui akan kewujudan bekalan gas kepada premis tersebut dan bau gas tidak cukup jelas bagi membolehkan ianya dikenal-pasti dengan positifnya sedemikian rupa. Walaubagaimanapun, bank tersebut adalah sesungguhnya tidak bebas daripada dipersalahkan.

[9] Berdasarkan rekod-rekod, tidak terdapat salah arahan atau kesilapan di pihak hakim dalam memutuskan bahawa Kerajaan seharusnya lebih bertanggungjawab. Bank tersebut, dengan hanya mempunyai kawalan terhadap premis tersebut dan tidak lebih daripada itu, tidak seharusnya dipertanggungjawabkan lebih daripada Kerajaan, yang telah memasang bekalan gas tetapi telah tidak melakukan apa-apa lagi bagi memastikan keselamatan pengguna-pengguna premis tersebut. Pengagihan tanggungan tersebut telah disahkan sebagai sesungguhnya telah dibuat dengan betul di sisi undang-undang.

[Rayuan perayu telah dibenarkan sebahagiannya; rayuan Kerajaan telah ditolak.]

Cases referred to:

Bullock v. London General Omnibus Co [1907] 1 KB 264 ***(refd)***
Chan Chin Min & Anor v. Lim Yoke Eng [1994] 3 CLJ 687 ***(foll)***
Foong Nan v. Sagadevan [1971] 2 MLJ 24 ***(foll)***
Kah Kee Leng v. Teresa Bong Nguh Chin & Anor [1978] 1 MLJ 61 ***(foll)***
KE Hilborne v. Tan Tiang Quee [1972] 1 MLJ 94 ***(cit)***
Kerry v. Carter [1969] 3 All ER 723 ***(foll)***
Petroliam Nasional Bhd & Anor v. Cheah Kam Chiew [1987] 1 MLJ 25 ***(foll)***
Rylands v. Fletcher [1868] LR 3 HL 330 ***(cit)***
Sanderson v. Blyth Theatre Co [1903] 2 KB 533 ***(foll)***
Sepang Omnibus Sdn Bhd v. Christine Loh Soo Peng & Ors [1970] 2 MLJ 234 ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(iv)(d), 8
Rules of the High Court 1980, O. 59 r. 3(2)

Civil Appeal No: Q-01-181-95
For the appellant - Mekanda Singh Sandhu; M/s Sandhu & Co
For the 1st respondent - Abdul Razak Tready (Supian Tarmizi Hj Mohd Tajuddin with him); State A-G's chambers
For the 2nd respondent - Lili Puk; M/s Abang Zen, Puk & Co
For the 3rd respondent - David Lim Chin Chai (Voon Chai Thong with him); M/s Wan Ullok, Jugah, Chin & Co

Civil Appeal No: Q-01-182-95
For the appellants - Abdul Razak Tready (Supian Tarmizi Hj Mohd Tajuddin with him); State A-G's chambers
For the 1st respondent - Mekanda Singh Sandhu; M/s Sandhu & Co
For the 2nd respondent - Chin Yoon Yet (Keith Chin Shiun with him); M/s Yong, Wong & Chin
For the 3rd respondent - David Lim Chin Chai (Voon Chai Thong with him); M/s Wan Ullok, Jugah, Chin & Co
For the 5th respondent - Lili Puk; M/s Abang Zen, Puk & Co

[Appeal from High Court, Miri; Suit Nos: MR 5 of 1993 & MR 60 of 1992]

Reported by Anne Khoo

JUDGMENT

Siti Norma Yaakob JCA:

Civil Appeals Q-01-181-95 and Q-01-182-95 were, with the consent of all parties, heard together as the causes of action in both appeals arose from one common tragedy. That tragedy happened on 16 February 1990 at 10am at the premises of Public Bank Berhad in Miri (the Bank) when inflammable gas escaped, got ignited and caused a series of explosions and fire that killed a customer of the Bank, one Jeffrey Satuk Gabar (the deceased), and seriously injured another, one Chin Fuei Yung alias Chooi Ngung Choi (Chin).

The widow of the deceased as the administratrix, filed civil suit No. MR 5/93 (the first suit) in Miri seeking damages on behalf of herself, the other dependants of the deceased which included the deceased's four minor children and his aged parents and the estate of the deceased under ss. 7 and 8 of the Civil Law Act 1956 (Act 67). She named the Government of Sarawak (the State Government), the supplier of gas in the town of Miri, as the first defendant, Liew Yit Tze (Liew) and Phua Su Meng (Phua), as the second and third defendants respectively, they being the registered proprietors of two adjoining plots of land, Lots 292 and 293, together with a building erected thereon which Liew and Phua had sub-leased to the bank, who in turn is cited as the fourth defendant.

The principal causes of action in that suit are:

(1) strict liability following the escape of gas, a dangerous thing, under the *Rylands v. Fletcher* rule against all four defendants.

(2) further or in the alternative negligence against all four defendants.

(3) further or in the alternative public nuisance against all four defendants.

(4) further or in the alternative breach of duty of care on the part of the bank as an occupier.

Chin had also filed separate proceedings in civil suit no. MR. 60/92 (the second suit) claiming special damages amounting to RM244,206.72 and general damages for pain and suffering against Liew, Phua and the bank based on three causes of action similar to those listed as (1), (2) and (3) above. In the course of the proceedings, the bank joined its building consultant, Perunding Dayacipta (Perunding), who renovated the demised premises before the bank moved in, the Director of Public Works Department (the director) and the State Government as the first, the second and the third parties respectively claiming indemnity and/or a right for contribution from the said third parties against the claims of Chin for damages and costs. Likewise Liew joined the director and the State Government as third parties seeking indemnity and/or contribution from them in the same manner as was done by the bank.

Judgment had already been entered against Phua in the first suit and the writ of summons in the second suit has not been served on him and for all intents and purposes he is in no way concerned with these instant appeals before us.

The claims of the widow and Chin were strenuously disputed by the other defendants and third parties and a general defence of denial of liability as well as specific ones that include unlawful tampering of the gas pipes and *volenti non fit injuria* were raised by them.

In the High Court, there was a joint trial of both civil suits and the proceedings were geared towards proving liability on the torts of negligence, strict liability and public nuisance against all the defendants and third parties and additionally occupier's breach of duty against the bank. Once liability was established, the learned trial judge proceeded to determine the various monetary claims made by the widow and Chin in their respective civil suits. The widow abandoned her claims grounded on strict liability under the *Rylands v. Fletcher* rule and public nuisance.

From the documentary and oral evidence of 12 witnesses testifying on behalf of the widow and Chin and 10 other defence witnesses called by the defendants and third parties, the learned trial judge made the following findings.

The First Suit

(1) The State Government is vicariously liable for the negligence of its agent, the director for failing to take appropriate steps to ensure safety after they had supplied and connected the gas to the demised premises. Judgment with costs is entered for the widow against the State Government.

(2) No blame can be attached to Liew as he had no part in the cause of the accident. Judgment is entered in his favour against the widow.

(3) For failing to take steps to investigate the foul smell that permeated the premises before the tragedy, the bank is held partly negligent for its omission that led to the happening of the accident.

(4) Alternatively the bank is liable for breach of its duty as an occupier to take care that its premises were safe.

(5) Liability between the State Government and the bank is apportioned at 90% on the part of the State Government and 10% on the part of the bank.

The Second Suit

(6) Judgment is entered for Chin against the bank.

(7) Perunding is free from any blame as there is no evidence to support the bank's allegations that Perunding's renovation works on the demised premises were defective or that their contractors meddled with the gas pipes. Thus the bank's claim for indemnity or contribution from Perunding in the second suit is dismissed with costs.

(8) Judgment is entered for the bank in respect of its claim for indemnity or contribution from the director and the State Government.

(9) No blame can be attached to Liew and judgment is entered in his favour against Chin. Consequently Liew's claim for indemnity or contribution against the director and the State Government was not entertained.

(10) The liability between the bank and the director and the State Government be apportioned against them on the basis of 10% against the bank and 90% against the director and the State Government.

(11) Chin's claim on strict liability under the *Rylands v. Fletcher* rule against Liew, Phua and the bank fails for lack of evidence. Likewise Chin's claim for public nuisance against the same three defendants is dismissed for want of proof.

Consequent upon the aforesaid findings, the learned trial judge made the following awards.

The First Suit

1. RM270,000 for loss of dependency, but from this amount, he deducted 1/3 for contigencies, other vicissitudes of life and accelerated payment thereby leaving a balance sum of RM180,000 as general damages.

2. The general damages payable is apportioned between the dependants of the deceased in the proportion of 20% to the widow, 15% each to the first two daughters of the deceased, 20% each to the only son of the deceased and the youngest daughter and 5% each to his aged parents. The amounts payable to the minor children are to be paid to the Public Trustee on trust until they reach majority.

3. RM10,000 for bereavement payable to the widow under s. 7(3A) of Act 67.

4. RM3,000 as funeral expenses with interest at the rate of 3% per annum from 16 February 1990 to date of trial.

5. As death was not instantaneous, RM3,000 is awarded to the estate of the deceased for pain and suffering.

6. Interest at the rate of 8% per annum on the judgment debt from 17 October 1995 to date of realisation.

7. Costs to be paid to the widow by the Government and the bank in the proportions of their respective liability.

8. The widow is to pay Liew's taxed costs.

9. All sums due from the Government and the bank are to be apportioned in the ratio of 90:10

The Second Suit

10. Chin is awarded RM50,000 as general damages for the 36%-37% second and third degree burns he suffered. In addition he is also awarded the following special damages:

    (i) RM20,000 for loss of earnings.

    (ii) RM400 for loss of clothing, shoes, watch and spectacles.

    (iii) RM124,152,10 for medical fees, hotel charges, taxi fares, airfares and other incidentals for his treatments in Singapore.

11. Interest at 3% per annum on the special damages from 16 February 1990 to date of trial.

12. Further interest at 8% per annum on the judgment debt from 17 October 1995 to date of realisation.

13. Costs to be borne by the State Government and the bank in the proportions of their respective liability.

14. The bank is to meet payment of the full quantum of damages as awarded to Chin totalling RM194,552.10 and costs to be taxed subject to it seeking contribution from the director and the State Government, the third parties, in the proportion of their joint liability ie, 90%.

15. Chin is to pay Liew's costs to be taxed.

16. The bank is to pay Perunding's costs to be taxed.

It is against the above findings and awards that notices of appeal have been lodged by

(1) the widow, who

(a) limits her appeal to the RM90,000 deducted from the total loss of dependency which had been assessed at RM270,000. She contends that there should not be any deduction.

(b) maintains that when ordering that she pays Liew's taxed costs, the learned trial judge should have further ordered that Liew's costs payable by her be added in the costs recoverable by her from the State Government and the bank ("Bullock order" so called following the order made in *Bullock v. London General Omnibus Co.* [1907] 1 KB 264). Alternatively Liew's costs be paid directly by his unsuccessful co-defendants, the State Government and the bank ("Sanderson order" so-called following the order made in *Sanderson v. Blyth Theatre Co.* [1903] 2 KB 533). Before us she opted for the direct form or order ie, the "Sanderson order".

(2) the state Government.

Although the notice of appeal filed by the State Government states that it is appealing against the whole decision of the learned trial judge, ie, liability and quantum, before us, it was confined to the extent of apportionment of liability only. Whilst conceding that it was liable, nonetheless the State Government contends that the extent of its liability when compared to that of the bank is minimal. As the occupier of the demised premises, the bank was

in complete control of such premises and should have been more vigilant when its staff detected the smell of gas a month before the tragedy happened. The bank did not notify the director of the presence of the smell and apart from spraying air fresheners to rid itself of the smell, the bank took no positive step to investigate the source of the smell. For such omission the State Government contends that the bank should carry the higher burden of responsibility and liability be apportioned 80% on the part of the bank and 20% on its part.

At this juncture, it is pertinent to ask under what circumstances can an appellate court vary or alter an apportionment made by a judge at first instance? That same question was posed to the English Court of Appeal in the case of *Kerry v. Carter* [1969] 3 All ER 723, where Lord Denning, MR answered it in the following manner.

> So we have both sides at fault, and we are left with the question of apportionment. We have been referred to cases on this subject, particularly the recent case of *Brown v. Thompson* [1968] 2 All ER 708; [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case by Edmund Davies LJ [1968] 2 All ER at p. 713; [1968] 1 WLR at p. 1012, when he quoted from the judgment of Sellers LJ, in *Quintas v. National Smelting Co. Ltd.* [1961] 1 All ER 030 at p. 636; [1961] 1 WLR 401 at p. 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts; but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a court of appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly.

In that case, the plaintiff, an 18½ year old apprentice was allowed by the defendant, a farmer, to use a circular saw. The plaintiff's only previous experience of circular saws was the instructions he had received in their use at a technical college which he attended when he was 15 years old and on a single occasion when he operated one on another farm 2½ years' previously when he was 16. Nevertheless, when the defendant asked him if he knew how to use the saw he said that he did and the defendant only watched for a few minutes before leaving him to work it on his own. The plaintiff put his hand across the path of the saw, slipped and severely injured his hand. In an action for damages, the judge found both parties to blame for the accident and having been told, wrongly, that the plaintiff was 17½ years old at the time of the accident, apportioned liability to the plaintiff at 20% and to the defendant 80%.

The Court of Appeal confirmed the trial judge's finding as to liability but found that there had been misdirection on his part on the apportionment of blame and altered it so as to hold that two-thirds of the blame fell on the plaintiff and one-third on the defendant. This is so as firstly the trial judge fell into error regarding the age of the plaintiff although the trial judge was not to be blamed and secondly by the trial judge's failure to consider the plaintiff's own conduct in misleading the defendant as to the nature and extent of his previous experience of working on a saw of that sort and thirdly what the plaintiff actually did while working the machine. We hasten to add that the principles enunciated in *Kerry v. Carter*, have been followed by our then Federal Court in:

(1) *Sepang Omnibus Sdn. Bhd. v. Christine Loh Soo Peng & Ors.* [1970] 2 MLJ 234;

(2) *Foong Nan v. Sagadevan* [1971] 2 MLJ 24;

(3) *Kah Kee Leng v. Teresa Bong Nguh Chin & Anor.* [1978] 1 MLJ 61.

Applying the aforesaid test we now consider whether the bank should shoulder the greater share of the blame than the State Government and whether the learned trial judge erred or misdirected himself when he found otherwise.

In this respect, we can do no better than to quote the learned trial judge as to the extent of the bank's liability as follows:

> As for the Public Bank it is my finding based on the evidence adduced that it could not be held responsible for bringing or allowing the supply of gas into the Premises. Similarly, there was no evidence adduced to show that the Public Bank had the knowledge of the gas supply when it look possession of the Premises. Hence, there was no basis for the contention of the learned counsel for the Plaintiff in the First Action that the Public Bank or its employees or agents did not take precautions on the safety of the gas pipe when the renovation works were done. There was also no evidence adduced that the Public Bank knew of the existence of the gas pipe in the course of the renovation works. Thus, in my view it could not be expected to take steps at that point in time.
>
> But I find merit in the argument that the Public Bank, through its employees, including the Branch Manager, failed to take steps after becoming aware of the unfamiliar smell in the Premises. PW4, Marcell Usop @ Usop bin Pak, testified that prior to the accident, he smelt gas when he reported for work at 8.40 a.m. that morning of 16/2/990. But this witness also said that as he smelt benzene it prompted him to ask the guard on duty if the motorcycles were parked inside the Premises. The reply was in negative. That should have triggered him to check further. After all this witness testified that he spoke to

his Branch Manager about the smell on the 15/2/1990 but the latter did not do much except to use the air freshener in his room. Further, PW9 Wilson Ling Kuai Kwong corroborated PW4 when he said that he smelt something one month before the accident but he did not know what it was.

It is obvious from the evidence that none of the employees of the Public Bank did anything although the smell, whether it was benzene or something else, should have prompted them to investigate. There was no evidence adduced to explain the inaction of the employees. Thus, the omission on the part of the Public Bank, through its staff, to a certain degree led to the happening of the accident. For that, it is my finding that some blame should be attributed to the Public Bank. As to what extent, I will deal with that later.

Against such findings by the learned trial judge there is the undisputed fact that it is the policy of the State Government through its agent, the director, to install gas pipes to all premises in Miri and without any request for supply would connect the gas to all the premises. There is evidence that Phua was not on the list of accredited gas consumers and he never applied for the gas supply to his premises at shop lot no. 293 that was occupied by the bank, and neither did the bank request for supply. In the case of Liew, the registered proprietor of the adjoining lot that was also occupied by the bank, there was the undisputed evidence that as early as 1 November 1986 he had applied to disconnect the gas supply and no bills of charge were received by him.

There is also the added evidence that the director installed gas meters to the demised premises but never informed Liew or Phua of this fact and neither was any leak detection test carried out to the internal plumbing or after the meters were installed. Under those circumstances we consider that the omission on the part of the bank to investigate the source of the smell that permeated the premises one month before the explosions and fire or to connect that smell to that of leaked gas was understandable. Firstly the bank was not aware that there were gas pipes supplying gas to its premises and secondly the smell was not distinctive enough to suggest that it was gas. However we hasten to add that the omission to investigate does not absolve the bank from blame whatsoever.

On the face of the records, we consider that there has been no misdirection or error on the part of the learned trial judge to conclude that the State Government bear the heavier responsibility for the explosions and fire than the bank. The State Government through its agent, the director, after installing the gas pipes, sourcing the supply and fixing the meters without any request to do so on the part of the consumers, they being Liew, Phua and the bank, did nothing more to ensure the safety of the users of the premises. By contrast by having mere control of such premises without more, the bank's share of responsibility for the tragedy cannot be greater than that of the State

Government. Since there were available material on which the learned trial judge exercised his discretion in the manner it was done, we see no reason to disturb his finding of apportionment that the State Government bear 90% of the blame and the bank 10%. We confirm that apportionment as being rightly made in law.

As we have stated earlier, the widow's appeal is two fold

(1) the 1/3 deduction of RM90,000 against the total award for loss of dependency, the objection being the right to deduct but not the amount deducted.

(2) the liability to pay Liew's costs.

For loss of dependency, the learned trial judge had on the formula provided by s. 7(3)(iv)(d) of Act 67 calculated the deceased's loss of earnings on the multiplier of nine years purchase and a multiplicand of RM2,500 per month after all the allowable deductions were made. These two figures are not disputed and a total sum of RM270,000 was reached as general damages for loss of dependency. The learned trial judge did not stop there but went on to deduct a sum of RM90,000 equivalent to 1/3 from the total sum calculated thereby leaving a balance of RM180,000 payable. Apart from stating that the 1/3 deduction was for contigencies, other vicissitudes of life and accelerated payment, he did not identify what such deduction relate to.

It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s. 7(3)(iv) of Act 67 on 1 October 1984, the discretion to deduct a sum for contigencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention she relies on the minority decision of the Supreme Court in the case of *Chan Chin Min & Anor v. Lim Yoke Eng (Lawful Mother of Gan Swee Hock, Deceased)* [1994] 3 CLJ 687.

As a court that is inferior to the Supreme Court, we are bound by the principle off *stare decisis* to accept the majority decision in *Chan's* case. That majority judgment states that as a matter of interpretation if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contigencies, other vicissitudes of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan's* case, we

found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

We now come to the widow's appeal against her liability to pay Liew's taxed costs. She claims that a "Sanderson order" should have been made and that Liew's costs be borne directly by his unsuccessful co-defendants, the State Government and the bank in the proportions of their respective liability. This is so as at the time the first suit was filed, it was not possible to ascertain who was responsible for the explosions and fire at shop lots 292 and 293. This uncertainty is reflected in her re-amended statement of claim where she had sued all four defendants for negligence. Liew in turn threw the blame to the State Government, the supplier of the gas and the bank, as the sub-lessee and occupier of the demised premises where the explosions and fire occurred in his state of defence.

In *Sanderson v. Blyth Theatre Company, supra,* the English Court of Appeal held that where relief is claimed against more than one defendant in the alternative, the court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant.

What constitute a proper case, must, we say, depend on the facts of each case. We fully appreciate that costs are in the discretion of the trial court and that an appellate tribunal would only interfere in the exercise on such discretion if it can be shown that the discretion had been exercised on wrong principles. See the cases of *KE Hilborne v. Tan Tiang Quee* [1972] 2 MLJ 94 and *Petroliam Nasional Berhad (Petronas) & Anor. v. Cheah Kam Chiew* [1987] 1 MLJ 25.

In the instant appeals, the learned trial judge has not stated any reason why he had ordered the widow to pay Liew's costs. We can only assume that he did so on the general principle that costs should follow the event. In this regard O. 59 r. 3(2) of the High Court Rules 1980 contains the following provisions:

> (2) If the court in the exercise of its discretion sees fit to make any order as to costs of or incidental to any proceedings, the court shall, subject to this Order, Order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other Order should be made as to the whole or any part of the cost.

From our understanding of the aforesaid provisions, it appears that the learned trial judge has the jurisdiction to make orders of costs in the nature of a 'Bullock" or "Sanderson order" provided the circumstances warrant the making of such an order.

On the facts of the appeals before us, we ask whether it was reasonable and proper for the widow to have joined both the State Government and the bank in the same action. We answer this in the affirmative as it was the State Government that brought and supplied the gas, a dangerous thing, to the demised premises occupied by the bank. Evidence was later shown that the supply and connection of the gas to the demised premises was without the bank's knowledge. The same cause of action ie, negligence has been pleaded and proved against them. Additionally an occupier's breach of duty has been pleaded in the alternative and proven against the bank as well.

In this respect we feel that had the learned trial judge consider the rather unusual aspect of the widow's claims, he would have appreciated that the surrounding circumstances call upon him to exercise his discretion in the manner now argued before us. Since he did not do so, it falls upon us to correct what was not correctly decided and in so doing we vary the order of costs payable to Liew in that such costs be paid directly by the State Government and the bank in the proportions of their respective liability.

As the widow has succeeded partly on her appeal, we had allowed civil appeal no. Q-01-181-95 to the extent that the costs payable to Liew be paid directly by the State Government and the bank in the proportions of their respective liability. The order of the learned trial judge on Liew's costs was accordingly varied. However the widow's appeal on the 1/3 deduction on her claim for dependency is dismissed. We confirm the learned trial judge's order of such deduction and granted her ½ the costs of her appeal to be paid by the State Government and the bank in the proportions of their respective liability. The deposit made in this appeal is to be refunded to the widow.

As for the director and the State Government's appeal, Q-01-182-95, for the reasons appearing in this judgment, we dismissed it with costs here and below.

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